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April 22, 2022

Via Electronic Filing

Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300

Re: ***Docket No. A-41, Sub 21***
Village of Bald Head Island v. Bald Head Island Transportation, Inc. and Bald Head Island Limited, LLC

Dear Ms. Dunston:

Transmitted on behalf of the Village of Bald Head Island for filing in the above-referenced docket is the Complainant's Reply to Respondents' Response, Motion to Dismiss, and Answer.

Should any questions arise in connection with this matter, please do not hesitate to contact this office.

Very truly yours,

Marcus W. Trathen
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Enclosure

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. A-41, Sub 21

VILLAGE OF BALD HEAD ISLAND, Complainant,	)	
v.	)	**COMPLAINANT'S REPLY TO RESPONDENTS' RESPONSE, MOTION TO DISMISS, AND ANSWER**
BALD HEAD ISLAND TRANSPORTATION, INC. and BALD HEAD ISLAND LIMITED, LLC, Respondents.	)	

Complainant Village of Bald Head Island ("VBHI" or the "Village"), pursuant to the Commission Rule R1-9 and the Commission's April 4, 2022 *Order Serving Answer and Motion to Dismiss* and April 8, 2022 *Order Granting Motion for Extension of Time*, submits this Reply to Respondents' Response, Motion to Dismiss, and Answer ("Response") filed in the above-captioned proceeding by Bald Head Island Transportation, Inc. ("BHIT") and Bald Head Island Limited, LLC ("BHIL" or "Limited") (collectively, "Respondents").

As set forth herein, the Respondents' Response is not satisfactory to the Village. Accordingly, the Village requests that this matter be set for hearing pursuant to the Commission's customary practices and procedures, including the right to discovery.

INTRODUCTION

The Complaint sets forth two claims. First, the Village contends that the Parking Facilities at Deep Point Marina, which are operated by Limited, are integral to BHIT's regulated ferry services and should be subject to the Commission's regulatory authority. Second, the Village contends that the Barge operated by Limited is a common carrier

service that is subject to the regulatory requirements for such service. Based on these claims, the Village asks the Commission to require BHIT and Limited to submit the Parking Facilities and the Barge to Chapter 62's requirements and, pending further orders, hold in place the existing rates for the Parking Facilities and the Barge.

Respondents do not—and cannot, under applicable Rule 12(b)(6) standards—dispute the Complaint's core allegations. Instead, Respondents assert that their conduct is immune from a complaint under Section 62-73—an argument previously rejected by the North Carolina Supreme Court. In addition, Respondents assert that the issues at hand are not ripe by mischaracterizing the Complaint as a request to have the Commission inject itself into the prospective sale of Respondents' assets. But the Village makes no such request. To state the obvious, *even if Respondents never sell their assets*, the Parking Facilities and the Barge should nevertheless be subject to the Commission's oversight. While the potential sale of Respondents' assets creates urgency to resolve the claims—due to valid concerns that a new owner will extract monopoly rents from the assets or deploy them for non-utility uses—the Village's claims are not contingent on such a sale occurring and would be equally applicable to a new owner.

Because the Complaint raises regulatory issues that are ripe for resolution and squarely within the Commission's jurisdiction, the Village asks the Commission to dispense with Respondents' motion to dismiss and proceed to the merits of its claims.

FACTUAL ALLEGATIONS

The following are the key allegations alleged by the Village in the Complaint which are taken as true for purposes of Respondents' motion to dismiss. *See* Order Denying Halo's Motion to Dismiss, *In re Bell South Telecommc'ns Inc., v. Halo Wireless, Inc.*,

Docket No. P-55, Sub 1841, at 3 (June 27, 2012).

I. The public can reach Bald Head Island only by riding BHIT's Ferry.

Bald Head Island (the "Island") is located at the confluence of the Cape Fear River and Atlantic Ocean. Cmplt. ¶ 12. A unique feature of the Island is that automobiles are prohibited on the Island (except for commercial uses, public works, and public safety purposes). *Id.* The Island has over 1,000 private residences, the majority of which are used by vacationers who make regular trips to their homes or rental properties on the Island. *Id.* ¶¶ 12, 13. The Island is also visited by "day trippers," who work on the Island or seek to tour the Island attractions. *Id.* ¶ 13. Collectively, the daily population of the Island can exceed 7,000 persons during peak season. *Id.*

The Island is accessible only by boat; there is no bridge to the Island. *Id.* ¶ 15. Aside from those who own private boats to reach the Island, the only means of public access to the Island is via a twenty-minute ferry ride using ferries operated by BHIT. *Id*. BHIT is engaged in the business of transporting passengers and their personal effects by ferry between the Island and the mainland. *Id.* ¶ 3. BHIT operates the ferry service as a public utility that is subject to the jurisdiction of the Commission. *Id.* BHIT is a wholly owned subsidiary of Limited, *id.* ¶ 6, which in turn is owned by the George P. Mitchell Family Corporation, the developer of Bald Head Island, *id.* ¶ 5.

II. To ride BHIT's ferry to the Island, passengers must park at the Parking Facilities operated by BHIL.

Because the Island is essentially free from all automobiles, all visitors to the Island must leave their automobiles at the Parking Facilities at the Deep Point Marina terminal. *Id.* ¶ 18. Limited, in addition to owning BHIT, owns the Parking Facilities. *Id.* ¶ 19.

The Parking Facilities are the sole parking option for ferry passengers. *Id.* ¶ 21.

Moreover, there is no alternative parking service available to the public. *Id.* ¶ 22. Thus, for visitors to reach the Island, they must drive to and park at the Parking Facilities and then purchase a ticket to ride the ferry.

Furthermore, a significant proportion of Island visitors are vacationers. *Id.* Such visitors often bring a large number of personal items, which requires them to transport themselves and their baggage to the Deep Point terminal using their own motor vehicles. *Id.* For these vacationers, the Parking Facilities are especially critical. *Id.*

In addition to residents and vacationers, the Parking Facilities are essential for Island workers, who account for almost 44% of the ferry's total ridership. *Id.* ¶¶ 22, 23. The ferry is the only means to transport Village personnel who provide essential municipal services, including public safety personnel and utility workers. *Id.* ¶ 23. For these workers to reach the Island, they must park at the Parking Facilities.

III. The Barge operated by BHIL is the only carrier of large household goods to the Island.

In addition to owning the Parking Facilities, Limited owns and operates a barge (together with its associated tugboat, the "Barge") to ferry vehicles and materials—including household goods too large for the ferry—to and from the Island. *Id.* ¶ 5. The public can reserve space on the Barge at published prices on a first-come, first-served basis. *Id.* ¶ 25.

Household goods of all types are conveyed to the Island by the Barge, either for homeowners furnishing their homes or for resale by businesses on the Island. *Id.* ¶ 26. Importantly, one must use the Barge to transport large household goods to the Island. *Id.* ¶¶ 25-27, 65. If a person wishes to transport any large household goods to or from the Island, there are several options, each of which includes use of the Barge. *Id.* ¶ 27. For

example, a merchant could reserve space on the Barge for the merchant's delivery truck, and online purchases are delivered by UPS or FedEx to the terminal and then loaded onto the Barge for transport to the Island. *Id.* ¶¶ 27, 28. In addition, persons can transport large household goods to and from the Island by reserving space on the Barge to transport their vehicle (a rental truck or trailer, for example) with their goods inside. *Id.* ¶ 27 & n.6.

An islander's ability to transport large household goods to their residence on the Island is dependent on the Barge. *Id.* ¶ 29. There are no alternatives.

IV. Although the public has longstanding concerns that the Parking Facilities and the Barge are not regulated, the issue has never been resolved by the Commission.

For decades, residents and businesses on the Island have been troubled by the Parking Facilities and the Barge not being subject to the same regulatory oversight as the ferry service. *Id.* ¶ 32. While the public has expressed these concerns to the Commission, the issues have never been formally pursued to the point of a Commission determination.

For example, the public first notified the Commission of the problem of Limited's unregulated operation of the Parking Facilities and the Barge in the 1998 docket regarding the ferry's operating schedule. *Id.* ¶ 33 & n.8. However, the issue before the Commission was the ferry's schedule, not the operations of the Parking Facilities and the Barge. *See* Recommended Order, *In re Bald Head Island Transp., Inc. – Proposed Change in the Operating Schedule of its Ferry Boats*, Docket No. A-41, Sub 1 (Nov. 10, 1998). Then in 2010, these concerns were reiterated and amplified during BHIT's rate case (the "2010 Rate Case"), where numerous residents and businesses testified concerning the need for regulation. Cmplt. ¶ 33 & n.9. However, the parties ultimately resolved their disputes with an accepted stipulation that avoided a ruling on the regulatory status of the parking

operations. *See* Order Granting Partial Rate Increase and Requiring Notice, *In re Application of Bald Head Island Transp., Inc. for a Gen. Increase in its Rates & Charges Applicable to Ferry Serv. Between Southport, N.C. & Bald Head Island, N.C.*, Docket No. A-41, Sub 7 (Dec. 17, 2010).

Thus, though public concerns about the Parking Facilities and the Barge have been raised, the Commission has not had to address its jurisdiction over these two utility services. The issue has likely been avoided because Limited has historically placated public concerns by entering into agreements to limit the rates for these utility services. *See id.* ¶¶ 35–39. For instance, in 2009, Limited committed to limit rate increases for annual parking between 2009 and 2014. *Id.* ¶ 35. Then as part of the 2010 Rate Case, the settlement agreement and stipulation obligated Limited to restrict parking rate increases through 2016. *Id.* ¶¶ 37, 39.

Historically, the George P. Mitchell Family Corporation (the "Mitchell Family Corporation")—Limited's owner—had a strong financial incentive to offer reasonable rates for the ferry, the Parking Facilities, and the Barge. The Mitchell Family Corporation was not only the de facto gatekeeper to the Island, it was also the core investor in the Island. *Id.* ¶ 5. As the Island's developer, the Mitchell Family Corporation wanted residents and visitors to have economical access to the Island so that the company could make a profit selling Island properties as attractive homes and investments. Prohibitive rates for the ferry, the Parking Facilities, and the Barge would risk leaving the Mitchell Family Corporation with unmarketable properties on the Island. As such, the Mitchell Family Corporation has been, understandably, responsive to public concerns about Respondents' utility services.

V. Proposed sale of transportation assets.

Although the Mitchell Family Corporation has been a good steward of Respondents' utility services, another owner of Limited would not have the same motivation to economically price the ferry, the Parking Facilities, and the Barge. The Village obviously does not want Respondents' assets to become a means of extracting monopoly rates or to be diverted to other, non-utility uses. *See id.* ¶¶ 24, 48. Therefore, when Limited expressed its intention to divest itself of the ferry and related transportation assets, the Village had legitimate interest in the prospective transaction. *See id.* ¶ 43.

Several potential purchasers of Respondents assets have emerged, including the Village, the Bald Head Island Transportation Authority (the "Authority"),[1] and unnamed private third parties. *Id.* Both the Village and the Authority have had finance applications pending before the Local Government Commission for months. *Id.*; *see also* N.C. Gen. Stat. § 160A-685(a), (c)(28). In the meantime, Limited has publicly stated that it intends to move forward with a private sale of Limited's assets. Cmplt. ¶ 44. Limited is already "in due diligence with certain parties." *Id.* Limited has declared that it is willing to split the

[1] Respondents dedicate three pages describing the Authority's history and operations. *See* Response at 3–7. These facts are not only extraneous to the Complaint, they are irrelevant to the Village's claims. While the Village supported the Authority's creation, Island residents expressed serious concern to the Village once the details became publicly known concerning the Authority's proposal for acquiring and operating Limited's assets. In response, the Village investigated alternatives that would better advance the public interest. Suffice it to say, as the governing body of the Island, *see id.* ¶¶ 1, 10, the Village would be interested in operating the gateway to the Island, and this interest is shared by citizens of the Island, as evidenced by their support for a referendum to issue general obligation bonds to purchase the transportation assets. *See* https://www.wilmingtonbiz.com/maritime/2021/11/05/bhi_voters_approved_a_52m_transportation_referendum_what%E2%80%99s_next/22529 (last visited Apr. 13, 2022). The Complaint openly stated the Village's interest in purchasing the assets, including its attempt to secure debt financing. *See* Cmplt. ¶ 43.

related utility services into pieces to maximize the sale price. *Id.*[2]

In light of the potential partitioning of Limited's assets to profit-driven private owners, the Village asks the Commission to exercise its jurisdiction over the Parking Facilities and the Barge to ensure the public continues to have access to these indispensable utility services. This request is essential, not just for those intermittent visitors seeking to enjoy the Island, but also for those property owners who acquired property on the Island with the reasonable expectation that the essential, monopoly transportation services would be operated in the public interest.

OPPOSITION TO MOTION TO DISMISS

I. Standard of Review.

The Commission uses the standards set forth in the Rules of Civil Procedure when adjudicating its own matters, as have appellate courts reviewing the Commission's decisions. *See, e.g.*, Order Denying Motions to Dismiss, Allowing Motion to Consolidate, and Scheduling Hearing, *In re Piedmont Nat. Gas Co. v. Pub. Serv. Co. of N.C.*, Docket No. G-5, Sub 508, at 3 (Sept. 3, 2009) (applying N.C. R. Civ. P. 12(b)(6) when adjudicating motion to dismiss and relying on decisions from North Carolina appellate courts). Accordingly, the Commission evaluates a motion to dismiss under same standard as a court interpreting North Carolina Rule of Civil Procedure 12(b)(6). *See id.*

A motion to dismiss under Rule 12(b)(6), "tests the legal sufficiency of the complaint. In ruling on the motion, the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the

[2] It must be noted that Respondents, in their Response, did not deny their willingness to carve up and sell Limited's utility services to the highest bidders. *See* Answer ¶ 44 (admitting allegations).

allegations state a claim for which relief may be granted." *Lamb v. Styles*, 263 N.C. App. 633, 637, 824 S.E.2d 170, 174 (2019) (internal quotations omitted). "A motion to dismiss under Rule 12(b)(6) should not be granted "*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC,* 269 N.C. App. 1, 7, 837 S.E.2d 144, 149 (2019) (emphasis in original); *see* Order Denying NuVox Motion to Dismiss, *BellSouth Telecommc'n, Inc. v. NuVox Commc'n, Inc.*, Docket No. P-1341, Sub 1, at 8 (Apr. 20, 2007) ("The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a legal certainty that the plaintiff is not entitled to relief under any state of facts[.]"). In addition, "matters outside the complaint are not germane to a Rule 12(b)(6) motion." *Charlotte Motor Speedway, LLC v. Cty. of Cabarrus*, 230 N.C. App. 1, 5, 748 S.E.2d 171, 175 (2013) (quotation omitted).[3]

II. Respondents' Arguments for Dismissal Lack Merit.

Respondents advance six overlapping arguments as to why the Complaint should be dismissed. None of Respondents' arguments come close to justifying the dismissal of the Village's claims.

A. The Village's Complaint Falls Within the Commission's Jurisdiction.

Respondents advance a meritless interpretation of Section 62-73, claiming that a complaint is inappropriate because the Village does not allege any wrongful act or omission by BHIT. Respondents misread both the Complaint and the governing statute. First, the

[3] Respondents' motion to dismiss is overflowing with new (and often unsupported) allegations that are found nowhere in the Complaint. *See*, *e.g.*, Response at 4, 5. Respondents are not entitled to rewrite the factual narrative of the Village's Complaint, and Respondents' extraneous allegations are wholly irrelevant to the motion to dismiss.

Complaint plainly alleges an act or omission by a public utility (in this case *both* BHIT and Limited), as required by Section 62-73. Second, Respondents overlook that the Complaint asserts claims for relief under both Section 62-73 and the Commission's declaratory ruling authority, either of which is sufficient to afford relief.

1. The Complaint satisfies Section 62-73.

Respondents assert that the Village's Complaint is defective because it fails to allege that *a public utility* did anything wrong. Specifically, Respondents argue that, although BHIT is a public utility, there is no allegation of "any wrongful act or omission by BHIT." Response at 9. This argument ignores the actual allegations in the Complaint.

Section 62-73 provides that "[c]omplaints may be made . . . by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility[.]" N.C. Gen. Stat. § 62-73. As the Commission has explained, "[i]f the complaint alleges violations of public utility rates, tariffs, or practices, the Commission has jurisdiction." Order on Jurisdiction and Dismissal of Complaint, *In re City of Greensboro v. Duke Energy Carolinas, LLC*, Docket No. E-7, Sub 1038, at 13 (Mar. 5, 2014). The Village's factual allegations and legal claims place its Complaint against BHIT and Limited squarely with the scope of Section 62-73.

First, the Complaint asserts acts or omissions by BHIT that contravene Chapter 62. The Complaint alleges that BHIT is, in essence, operating an integral part of its ferry service outside of the Commission's supervision. The Complaint demonstrates that the Deep Point Parking Facilities are a critical aspect of the ferry service offered by BHIT. *E.g.*, Cmplt. ¶¶ 24, 51. Indeed, the Complaint makes clear that, in the absence of the Parking Facilities, the public would not have access to BHIT's ferry services. *See id.* ¶¶

21-24. Under Chapter 62, a utility "service" includes "any service furnished by a public utility, including . . . *any ancillary service or facility used in connection with such service*." N.C. Gen. Stat. § 62-3(27) (emphasis added). As an integral component of BHIT's ferry services, the Parking Facilities are, at a minimum, an "ancillary service or facility" which, by statute, is encompassed within the utility "service" offered by BHIT. Utility services are, of course, subject to the supervision of the Commission. *See id.* § 62-32(a). The Village's Complaint articulates valid claim that BHIT is wrongfully operating the Parking Facilities—an essential, ancillary facility to its utility service—outside the regulatory authority of the Commission.

Second, the Complaint asserts acts or omissions by Limited that contravene the requirements of Chapter 62. The Complaint alleges that Limited is operating two utility services—the Parking Facilities and the Barge—outside of the Commission's supervision. As for the Parking Facilities, the Complaint sufficiently alleges that Limited is the parent company of BHIT, and Limited's operation and pricing of the Parking Facilities have a direct effect on BHIT's ferry rates and services. Cmplt. ¶¶ 57–58. As such, Limited is a "public utility" under Chapter 62. *See* N.C. Gen. Stat. § 62-3(23)(c). As for the Barge, the Complaint demonstrates that the Barge transports large household goods to the Island, that Limited holds itself out to the public for this service, and, therefore, that Limited is a "common carrier" subject to regulation per Chapter 62. *Id.* § 62-3(6); *see id.* § (23)(a)(4). In its Complaint, the Village claims Limited is wrongfully operating as a public utility—through its operations of the Parking Facilities and the Barge—without complying with the regulatory requirements applicable to such service.

Stated simply, the Village's Complaint asserts that BHIT *and Limited* are public utilities under Chapter 62 that are offering service without complying with the applicable regulatory requirements. These requirements include, among other things, obtaining a Certificate of Public Convenience and Necessity,[4] maintaining certain books and records,[5] submitting to rate regulation,[6] paying regulatory fees,[7] complying with the prohibition of unauthorized transfers and assignments,[8] and submitting to the Commission's authority over consumer complaints regarding service quality and related matters. The Commission, of course, has ample authority under Chapter 62 to provide redress to complaints about such non-compliance through penalties and other remedial orders.[9]

Alternatively, Respondents seek to narrow the subject matter of complaints to only "rates and rate structure," "deficiencies in . . . services," and "conduct of . . . regulated activities." Response at 9. Respondents offer no authority for their circumscribed list of

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[4] *See* N.C. Gen. Stat. § 62-110(a) ("[N]o public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation."). *See, e.g.,* Letter from Edward S. Finley, Jr., Chairman, N.C.U.C., to Mr. Patrick M. Kenney, Superintendent, Cape Lookout National Seashore, dated May 5, 2013 (attachment to Motion in the Cause, *In re Island Express Ferry Serv., LLC – Application to Transport Passengers in Ferry Operations*, Docket No. A-75, Sub 0 (Dec. 20, 2013)).

[5] *See, e.g.,* Order Granting Common Carrier Authority, *In re Island Express Ferry Serv., LLC – Application to Transport Passengers in Ferry Operations*, Docket No. A-75, Sub 0, at 2 (Mar. 31, 2014) (requiring ferry utility to "maintain its books and records in such a manner that all of the applicable items of information required in the prescribed Annual Report to the Commission are available for use by the Applicant in the preparation of such Annual Report.").

[6] *See, e.g.,* N.C. Gen. Stat. § 62-130 *et seq.*

[7] *See* N.C. Gen. Stat. § 62-302.

[8] *See* N.C. Gen. Stat. § 62-111.

[9] *See* N.C. Gen. Stat. § 62-310 ("Any public utility which violates any of the provisions of this Chapter or refuses to conform to or obey any rule, order or regulation of the Commission shall, in addition to the other penalties prescribed in this Chapter forfeit and pay a sum up to one thousand dollars ($1,000) for each offense . . . .").

requirements, and the statute itself, on its face, sweeps far more broadly, extending to "*any act or thing done or omitted to be done* by any public utility[.]" N.C. Gen. Stat. § 62-73 (emphasis added). The broad scope of Section 62-73, of course, easily captures an entity's failure to comply with the myriad regulatory requirements associated with the provision of a regulated service.

The determination of whether an entity's conduct is a utility service subject to Chapter 62 is central to the Commission's regulatory authority. Thus, it is not surprising that that Commission routinely has adjudicated complaints and petitions in which parties objected to entities seeking to offer utility services without submitting to the Commission's supervision. *See, e.g.,* Order Issuing Declaratory Ruling, *In re Pub. Util. Status of Am. Homes 4 Rent,* Docket No. M-100, Sub 144 (Oct. 18, 2016) (petition filed by Public Staff seeking determination of regulatory status applicable to provision of water-sewer service by owner of rental properties to tenants); Order Determining Utility Status, *Pub.-Staff-N.C. Utils. Comm'n v. Campus-Raleigh, LLC*, Docket No. M-89, Sub 8 (June 1, 2012) (complaint filed by Public Staff alleging that Campus-Raleigh was acting as electric public utility and water-sewer reseller without complying with applicable regulatory requirements).

By focusing solely on BHIT, Respondents are implicitly arguing that the Commission cannot address a complaint about Limited's utility services because the Commission has yet to label Limited as a public utility. In *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.* (*Southern Bell II*), 326 N.C. 522, 391 S.E.2d 487 (1990), the Supreme Court of North Carolina rejected the respondent's argument that it could not be the subject of a complaint under Section 62-73 because it was not a labeled public utility. The Supreme

Court criticized the respondent for "plac[ing] too much emphasis on the term 'public utility' as found in the statute, *rather than looking at the functions which the public utility is required by statute and by rule of the Commission to perform*." *Id.* at 527, 391 S.E.2d at 490 (emphasis added). The Supreme Court concluded that because the respondent was performing a public utility service, the Commission has jurisdiction over complaints about the respondent's performance of this service. *Id.* at 529, 391 S.E.2d at 491. Here, Limited is a public utility both because of its operation of the Parking Facilities for its subsidiary and because its common carrier operations of the Barge, and the Complaint objects to Limited continuing to offer these utility services without submitting to the associated regulatory requirements. *Cf. State ex rel. Utils. Comm'n v. Mackie*, 79 N.C. App. 19, 32, 338 S.E.2d 888, 897 (1986), *aff'd as modified*, 318 N.C. 686, 351 S.E.2d 289 (1987) ("The status of an entity as a public utility . . . does not depend upon whether it has secured a certificate of public convenience and necessity, pursuant to G.S. 62–110, but is determined instead according to whether it is, in fact, operating a business defined by the Legislature as a public utility.").

If Respondents were correct—and parties could not use Section 62-73 to complain of an entity's improper provision of public utility services—then there would be no mechanism for objecting to an entity's unregulated operation of utility services. Respondents cannot truncate Section 62-73 so as to shield their utility services from the Commission's reach.

2. *Respondents' argument overlooks alternative grounds for similar relief.*

Although the Village has properly stated claims for relief under Section 62-73, the Commission also has jurisdiction over the Complaint because the Village included a

request for a declaratory ruling. Respondents completely ignore the declaratory-ruling request of the Complaint.

Section 62-60 provides that "the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law." N.C. Gen. Stat. § 62-60. Section 1-253 empowers courts of general jurisdiction "to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." *Id.* § 1-253.

Here, the Village expressly invoked the Commission's declaratory powers as a basis for jurisdiction over the Complaint. *See* Cmplt. ¶ 9. The Village asked the Commission to (1) "declare that the Deep Point Parking Facilities constitute public utility property subject to the Commission's authority," (2) "declare that BHIL, to the extent of its ownership and operation of the Deep Point Parking Facilities, is a public utility subject to the regulatory authority of the Commission as an owner and operator of facilities used to provide, and an essential component of providing, utility service," (3) "declare that BHIL is a public utility under Chapter 62 because BHIL's ownership of the Deep Point Parking Facilities", and (4) "declare that the Barge service owned by BHIL is a common carrier activity under Chapter 62[.]" *Id.* ¶¶ 54, 55, 59, 66.

Separate from the two claims against Respondents, the Commission has jurisdiction over the Complaint based on the Village's multiple requests for declaratory rulings. *See, e.g., In re Pub. Util. Status of Am. Homes 4 Rent,* 2016 WL 6138940 (seeking declaration of regulatory status applicable to provision of water-sewer service).

B. The Village's Complaint Presents a Justiciable Issue.

Respondents argue that the Commission cannot adjudicate the Parking Facilities or Barge's utility status because doing so would result in a mere advisory opinion based on speculative or hypothetical facts. To make this argument, Respondents attempt to recast the Village's complaint as taking issue with the Ferry and Barge's sale. Response at 11–13. Because the sale has not yet occurred, Respondents reason, the Village's Complaint is premature. *Id.* at 13–15. Respondents' emphasis on the pending sale is a red herring. Even if the Parking Facilities and Barge were not for sale, the issue of whether the Parking Facilities and the Barge are subject to regulation would remain.

Respondents' citation to the recent decision of the Court of Appeals in *State ex rel. Utils. Comm'n v. Cube Yadkin Generation LLC*, 279 N.C. App. 217, 2021-NCCOA-455, is inapplicable. There, Cube Yadkin Generation, LLC ("Cube") had asked the Commission for a declaratory judgment that its plan to redevelop the Badin Business Park (the "Park") and lease Park property would qualify for the landlord/tenant exception to the definition of "public utility" in N.C. Gen. Stat. § 62-3(23)(d). *Id.* ¶ 4. If Cube's plan had been subject to the exception, Cube could have provided electricity, water, sewer, and telecommunications services to its tenants without encroaching on public utilities' rights. *Id.* The Court of Appeals declined to reach the merits of the appeal because Cube had not yet entered into lease agreements with any tenants, or even purchased the Park. Thus, the court reasoned, its opinion would be advisory. *Id.* ¶ 11.

Citing a potential unspecified transaction, Respondents contend that this Complaint must be dismissed under *Cube*. In *Cube*, however, the pending transaction was relevant to justiciability because Cube was asking for guidance from the Commission on a status it

had yet to obtain (a landlord at the Park). In contrast here, the conflict at the center of the Village's Complaint has already occurred: Respondents have been operating, and continue to operate, the Parking Facilities and Barge outside of the Commission's regulations. These issues exist independently from any potential sale. Thus, any decision by the Commission would not be "anticipatory," "advisory," or "provide for contingencies." Response at 15 (quoting *Cube*, 2021-NCCOA-455, ¶ 26 (Jackson, J., dissenting)).

Respondents' other citations are likewise inapplicable; neither case concerns the Commission's authority to determine whether a utility service is subject to its jurisdiction. Response at 14. In *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 347 S.E.2d 25 (1986), the North Carolina Supreme Court dismissed a request for a ruling on the enforceability of a covenant not to compete since there was no evidence that the former owners of a newspaper intended to compete with the new owners. In contrast, the Village's Complaint and Respondents' Response vividly demonstrate a bona fide, live dispute between the parties concerning the Respondents' compliance with regulatory requirements relating to their ownership and operation of the Parking Facilities and the Barge assets.

The Respondents' reliance on *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of Se.*, 281 N.C. 318, 335, 189 S.E.2d 705, 716 (1972) is misplaced. That case does not address justiciability (it addresses ratemaking) and the notion cited therein that the property of a utility is "private property" has nothing to do with the issues raised by the Complaint. The Complaint does not ask the Commission to force a sale to any particular party or to otherwise dictate the terms of any potential sale, rather it asks that the regulatory status of the assets and services be adjudicated and that the regulatory requirements associated with

those assets and services be enforced. Such requirements include, but are not limited to, applicable requirements under N.C. Stat. § 62-111 relating to the sales and assignments.

In sum, the Village does not ask the Commission to be an "adjunct transactional counsel," as Respondents claim. In fact, the claims asserted in the Complaint are not dependent on any purported sale. Because the issues at hand are justiciable, Respondents' motion should be rejected.

C. Statutory Authority Supports Jurisdiction over the Village's Complaint.

Respondents claim that there is no statutory basis for the Commission's authority over the Parking Facilities or the Barge. But rather than cite to any statute or legal precedent, Respondents rely on numerous factual assertions, none of which is appropriate at the motion-to-dismiss stage. *See Charlotte Motor Speedway, LLC*, 230 N.C. App. at 5, 748 S.E.2d at 175 ("[M]atters outside the complaint are not germane to a Rule 12(b)(6) motion.").

Respondents, without citation, make the broad argument that there is no precedent, in North Carolina or across the nation, supporting the regulation of a ferry's parking lot. In making this argument, Respondents ask the Commission to rely on the following facts:

- Limited operated parking facilities and barge service at the Indigo Plantation terminal dating back to 1993, at which point it was not subject to regulation. Response at 16.
- Unnamed members of the Public Staff visited Bald Head Island on unspecified dates in connection with other ferry matters. *Id.* at 17.
- Unnamed Commissioners visited Bald Head Island on unspecified dates. *Id.* at 17.
- Alternative parking could theoretically be offered, at an unspecified location. *Id.* at 19.
- Unspecified "vacant land" near the terminal could someday be converted to parking. *Id.* at 19.

- Passengers at other, unspecified ferries "around the country *may* park in satellite lots." *Id.* at 19 (emphasis added).
- Non-ferry passengers purportedly use the parking facilities. *Id.* at 19.

Even if such factual offerings were not wholly inappropriate at this early stage, Respondents offer *no* evidence to support any of their speculations.[10]

Once Respondents' premature factual claims and rank speculation are set aside, their only argument in favor of dismissal is that the Complaint presents a novel issue. Novelty, though, is not a basis for dismissal. The issues of the regulatory status of the Parking Facilities and Barge have never been squarely addressed by the Commission, and the Respondents do not cite any decision by the Commission (or any other regulatory or judicial body) addressing or disposing of the issues presented. Respondents are not entitled to assert in support of a motion to dismiss that they "believe" that the Commission or other commissions may have resolved these issues previously, and certainly they are not entitled to equate the Commission's silence to a determination of the issues.

Contrary to Respondents' argument, there *is* ample statutory support and relevant precedent for the Commission's assertion of regulatory authority over the Parking Facilities and the Barge.

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[10] *See* Response at 17 (speculating that the Commission regulates "seven ferry operations" and has never considered the regulation of their parking services); *id.* at 18 (speculating that other ferries provide ancillary services); *id.* at 18 (arguing, without citation that there are "numerous other barges and parking facilities" through North Carolina, "many of which are the only . . . means by which persons access specific locations); *id.* at 19 ("Upon information and belief," no other regulated parking facilities for a ferry exists in the entire United States). Even if there were evidence supporting these facts, the Commission could not take judicial notice of them because they are neither "so notoriously true as not to be the subject of reasonable dispute" or "capable of demonstration by resort to readily accessible sources of indisputable accuracy." *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 641, 256 S.E.2d 692, 696 (1979) (citation omitted). Because Respondents have not shown that the facts are capable of demonstration, they must be excluded. *See Charlotte Motor Speedway, LLC*, 230 N.C. App. at 5, 748 S.E.2d at 175.

1. The Parking Facilities

As set forth in the Village's Complaint, Chapter 62 defines a "services" as "any service furnished by a public utility, including any commodity furnished as a part of such service and *any ancillary service or facility* used in connection with such service." N.C. Gen. Stat. § 62-37(27) (emphasis added); *see also* Cmplt. ¶¶ 53–54. Here, the ferry is the "service," and the parking lot is an ancillary service or facility because the ferry's secluded location would render it inaccessible, and thus useless, without the use of the Parking Facilities.[11] Respondents do not address the Village's allegations other than with a conclusory argument, without any citation to authority, that there is no statutory basis for regulation of the Parking Facilities or Barge's operations. Response at 16.

In the alternative, Chapter 62 defines a public utility to include "all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility." N.C. Gen. Stat. § 62-3(23)(c). Because Limited's ownership and operation of the Parking Facilities has a direct effect on the rates and services of BHIT's ferry operation, Limited must be regulated as a utility under Section 62-23(c). Again, Respondents do not even address these allegations, much less cite any case or statute to refute the law. *See* Response at 16-19.

Not only does Chapter 62 foreclose Respondent's assertion that the Parking Facilities are exempt from regulation, but the Commission and the Supreme Court have

[11] Again, Respondents' argument that nearby land could be used to build additional parking is not appropriate at this stage. Moreover, it is speculation. There is no evidence that this land, which is owned by a third party, could feasibly be developed for parking. Further, Respondents admit that no other parking is available at this time and that visitors with summer rentals must use the Parking Facilities to transport large amounts of goods to the Island. Answer ¶ 22.

twice rejected a similar attempt by a utility to evade the Commission's regulation. First, in *State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.* (*Southern Bell I*), 307 N.C. 541, 544, 299 S.E.2d 763, 765 (1983), Southern Bell insisted that the Yellow Pages' advertising services were "not an essential part of the public utility function of providing telecommunications service" and, therefore, were inappropriate to consider in ratemaking. The Supreme Court of North Carolina chastised Southern Bell for relying on a "far too narrow" definition of the public utility function. *Id.* The Court affirmed the Commission's ruling because the advertising services were "an integral part of the public utility's function of providing adequate telephone service." *Id.* at 547, 299 S.E.2d at 766. Then, after Southern Bell had transferred the Yellow Pages to BellSouth Advertising and Publishing Company ("BAPCO"), BAPCO insisted its advertising services were immune from the Commission's supervision because it was not a public utility. *See State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.* (*Southern Bell II)*, 326 N.C. 522, 527, 391 S.E.2d 487, 490 (1990). The Supreme Court, relying on *Southern Bell I*, affirmed the Commission's jurisdiction over the advertising services "since BAPCO is performing this function for Southern Bell." *Id.* at 529, 391 S.E.2d at 491. The Court reasoned that "[p]roviding a telephone directory is a public utility function," and the Commission's jurisdiction over the function "continues even though the public utility transfers its duty to publish the directory to another entity." *Id.* at 531–32, 391 S.E.2d at 493.

As with Southern Bell and the Yellow Pages, the Parking Facilities are an integral part of BHIT's public utility function of providing adequate ferry service. In fact, the Parking Facilities are more essential to the ferry service than the Yellow Pages were to the phone service, because, while it was possible (and even common) to place a telephone call

without using the Yellow Pages, it is, as a practical matter, impossible to ride BHIT's ferry without using the Parking Facilities. Because the Parking Facilities are integral to BHIT's ferry service, Respondents cannot evade regulation of the Parking Facilities by operating them through a parent company and insisting they are outside the Commission's purview. *See also* Order Addressing Contracts and Related Issues, *In re Ocean Club Ventures, LLC,* Docket No. W-354, Sub 236 (April 1, 2001) (complaint proceeding initiated by developer; Commission concludes that developer of Buck Island should be declared to be a *de facto* public utility due to its ownership of critical "backbone" facilities necessary to provision of utility service), *aff'd* 162 N.C. App. 568, 592 S.E.2d 244 (2004).

Further, Respondents' claim that no parking facility has ever been regulated as a utility is incorrect. At least one other utility commission has specifically recognized that parking lots may be subject to regulation as an ancillary service. In *City of Mountain View v. Southern Pacific Co.*, 70 P.U.R.3d 304, 1967 WL 164047 (Cal. P.U.C. June 20, 1967), the California Public Utilities Commission held that a parking lot adjacent to a railroad station was subject to its jurisdiction. Although the railroad argued that the commission lacked jurisdiction because "parking is extraneous to the furnishing of transportation," the commission disagreed, concluding that "[c]ustomer parking facilities . . . owned by a railroad adjacent to a station of the railroad, are part of a service in connection with or incidental to" transportation of passengers and their baggage. *Id.* at 7. The commission also found that the parking facilities were "parts of the stations or depots of the railroad and are grounds and terminal facilities." *Id.* at 24.[12]

[12] *See also id.* at 9 ("We do not believe that in the year 1967 it can seriously be argued that customer parking facilities adjacent to a railroad station are not incidental to the safety, comfort, or convenience of the person being transported; are not part of a 'station' 'depot' 'grounds' or

2. The Barge

The Complaint plainly states grounds for relief with respect to the operation of the Barge. The Complaint alleges that the Barge is the only means by which members of the public can transport household goods[13] too large for the ferry (as well as other household goods) to and from the Island; that the public can reserve space on the Barge at published prices on a first-come, first-served basis; and that the service constitutes a common carrier service under N.C. Gen. Stat. § 62-3(6). That statute expressly defines a "common carrier" as "any person . . . which holds itself out to the general public to engage in the transportation of persons or household goods for compensation, including transportation by . . . boat[.]" Further the definition of "public utility" includes "persons . . . owning or operating in this State equipment or facilities for . . . [t]ransporting persons or household goods by motor vehicles or any other form of transportation for the public for compensation . . . ." G.S. § 62-3(23)a.4. Far from being "no" authority for the assertion of jurisdiction, Respondents Barge service falls squarely within the plain language of the governing statutes and, again, Respondents do not cite any authority holding otherwise. Moreover, the Commission has previously entertained consideration of whether barge service would be subject to the Commission's authority. *See State ex rel. Utils. Comm'n v. Bird Oil Co.*, 302 N.C. 14, 26, 273 S.E.2d 232, 239 (1981). Although, based on the specific facts presented in that case, the Commission declined jurisdiction, it did so without prejudice to

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'terminal facilities'; are not 'facilities' or 'service'; cannot be reasonably necessary to accommodate passengers; or by their location and use have no effect on the safety of the public and the railroad's customers, passengers, and employees" (internal quotations and citations omitted)).

[13] While the focus of the Complaint is on the transport of household goods, the Barge also plainly transports "persons" as well—as the vehicles loaded onto the Barge all have drivers. These facts are not substantially distinguishable from any other ferry, subject to the Commission's regulation, that transports vehicles and their passengers from one location to another.

a contrary decision based on contrary facts—facts alleged here.

In summary, there is no doubt that the Island's situation, and thus the facts of this case, are unique. But the fact that the case presents an issue of first impression does not justify its dismissal. As discussed above, the Commission has jurisdiction under North Carolina law to hear this case, and Respondents offer no valid reason not to hear this case. Respondents' argument is therefore without merit.

D. BHIT'S Last Rate Case Supports the Commission Asserting Jurisdiction over the Parking Facilities.

Respondents claim the Commission implicitly resolved the treatment of the Parking Facilities issue in the 2010 Rate Case proceeding by not including the Parking Facilities and the Barge in BHIT's rate base. Respondents go so far as to claim the Commission determined that the Parking Facilities and the Barge "were not considered to be part of the regulated utility." Response at 3.

First, the questions presented in this Complaint—whether the Parking Facilities and the Barge are utility services subject to the Commission's jurisdiction—are outside the scope of a rate case. In a rate case, the Commission determines what revenues a utility can collect by applying a rate of return to the value of the utility's property. *See* N.C. Gen. Stat. § 62-133(b). As part of this determination, the Commission assesses whether the utility's property is "'used and useful' in providing [utility] service." *State ex rel. Utils. Comm'n v. Pub. Staff - N. Carolina Utils. Comm'n*, 333 N.C. 195, 200, 424 S.E.2d 133, 136 (1993). Importantly, though, the "used and useful" inquiry is a test for inclusion, not exclusion. In deciding that the utility's identified property is "used and useful," the Commission is determining that the *identified* property is correctly *included* in rate base. *State ex rel. Utils. Comm'n v. Thornburg*, 325 N.C. 484, 495, 385 S.E.2d 463, 469 (1989) ("Since the excess

common facilities are not 'used and useful,' they *cannot be included* in the rate base." (emphasis added)). The Commission is not, as Respondents contend, making a finding that *unidentified* property is correctly *excluded*. Therefore, the Commission, by ruling in the 2010 Rate Case that BHIT's identified assets were "used and useful," the Commission was not declaring that the Parking Facilities were not "used and useful" in provide ferry service.[14]

But even if the Commission had addressed the issue at hand in the 2010 Rate Case, rate cases rulings are legislative, not judicial, in nature and, for that reason, such rulings are not binding in later proceedings. *See State ex rel. Utils. Comm'n v. Thornburg,* 325 N.C. 463, 467, 385 S.E.2d 451, 453-54 (1989); *State ex rel. Utils. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc.,* 257 N.C. 560, 569–70, 126 S.E.2d 325, 333 (1962). Thus, no determination in that proceeding is binding in this proceeding.

Second, the parties' agreements reached during the 2010 Rate Case undermines Respondents' argument that the Parking Facilities are not part of the regulated ferry service. To resolve the rate case, BHIT, the Public Staff, the Village, the Bald Head Association, Inc., and the Bald Head Island Club entered into a Revised Agreement and

[14] Respondents appear to claim the 2010 Rate Case also concluded the Barge was not a common carrier that is subject to the Commission's regulation. First, because the Barge's common carrier status is separate and independent from BHIT's ferry services, the Barge's regulatory status is irrelevant to the 2010 Rate Case. Second, even if the Barge's status was somehow relevant to the 2010 Rate Case, because the "used and useful" inquiry does not determine whether assets are properly excluded from rate base, the Commission's 2010 Rate Case ruling made no determination on the Barge's regulatory status.

Stipulation of Settlement (the "Settlement").[15] As part of the Settlement, the parties stipulated to the following:

- Revenues from the Parking Facilities would be imputed to BHIT.[16]
- Limited agreed to limit the increases in parking rates for the next six year (through 2016).[17]
- Limited would notify the Public Staff and the Commission of any sale or lease of the Parking Facilities prior to closing; and such sale will include the limitations on parking rates.[18]
- Gain from the transfer of the former ferry terminal facilities would be imputed to BHIT.[19]

Thus, while the Commission in the 2010 Rate Case made no determination of whether the Parking Facilities were an integral part of BHIT's ferry services, the parties to the proceeding reached an agreement that clearly treated them as such by imputing parking revenues to the ferry operation. As is customary with such stipulations, the parties agreed that the matters subject to compromise would not "confer, or provide a basis for Commission regulation or jurisdiction over rates, service, or complaints regarding parking services provided by Limited, or the assets utilized for those services, in this rate case."[20]

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[15] *See* Revised Agreement and Stipulation of Settlement, *In re Application of Bald Head Island Transp., Inc. for a Gen. Increase in its Rates & Charges Applicable to Ferry Serv. Between Southport & Bald Head Island*, Docket No. A-41, Sub 7 (Oct. 21, 2010).

[16] *See id.* at ¶ 2(C)(i). The parties agreed that the imputation of revenues was "limited to this case and establishe[d] no binding precedent for future cases, and [would] not be binding in future cases as a reason for or against imputation of parking revenues or any other regulatory treatment of parking operations." *Id.*

[17] *See id.* ¶ 2(C)(i)(a)–(b).

[18] *See id.* ¶ 2(C)(i)(c)–(d).

[19] *See id.* ¶ 2(C)(ii); *see also* Late-filed Exhibits of James G. Hoard, Public Staff, Docket No. A-41, Sub 7, at Ex. 1, Schedules 1, 3 and 7 (Oct. 21, 2010) (showing amortization of gain on transfer of Indigo Plantation).

[20] *See* Revised Agreement and Stipulation of Settlement, Docket No. A-41, Sub 7, at ¶ 10.

However, those concessions were limited to the 2010 Rate Case and do not prohibit the Commission from reaching those issues in this proceeding.

The 2010 Rate Case did not decide the issue presented in the Complaint. However, should the Commission consider the 2010 Rate Case in the current proceeding, it will find a record replete with evidence that the Parking Facilities are integral to the ferry services.

E. The Issues Presented in the Complaint Are Ripe for Determination.

Respondents claim the issues in the Complaint are premature. To the contrary, the Complaint asserts that Respondents are wrongfully operating the Parking Facilities and Barge outside the Commission's authority. The claims are based on conduct that has occurred in the past, is presently occurring, and will continue to occur absent the Commission's assertion of oversight authority. The issues are ripe.

Moreover, the potential division and sale of Respondents' assets adds urgency to the resolution of the issues raised in the Complaint. The Village does not want a future owner of the Parking Facilities and the Barge to extract monopoly rates from these unregulated utility services or to divert the utility assets for non-utility purposes. *See* Cmplt. ¶¶ 24, 48. But even if a sale were to never happen, the issues regarding the Commission's supervision of the Parking Facilities and the Barge would persist and require resolution.

Thus, Respondents incorrectly assert that the resolution of these issues can be deferred to a later CPCN-transfer proceeding or a rate case. Response at 23–24. Respondents are currently providing public utility services without complying with the applicable regulatory requirements associated with those services. The wrongful conduct to be address is occurring now. In addition, the alternative proceedings are ill-suited to resolve these issues. A CPCN-transfer proceeding would focus on the public's interest in

transferring *the ferry assets* to a new owner; the Parking Facilities and the Barge, which are not currently covered by the ferry's CPCN, could be considered to be beyond the scope of the transfer proceeding or those assets could have been already sold. Likewise, a rate case would focus on the reasonableness of the ferry's rates, and it would not delve into, for example, the separate rates to be charged for the Barge and use of the Parking Facilities. Additionally, none of these proceedings would address the overall regulatory compliance issues raised by the Complaint—e.g., the need for CPCNs to operate the utility assets and a remedy for past non-compliance.

Moreover, if Respondents are able to delay resolution of these issues and, for example, sell the Parking Facilities to a non-utility third party, it might be more difficult for the Commission to effectuate any remedy with respect to the disposition of those assets. Once the Parking Facility is sold to a buyer, it is unclear whether if the Commission could unwind the disposition of those assets. Further, the buyer may be surprised to find itself subject to regulation if the issue is not timely resolved.

Because the issues are ripe and the wrongful conduct is ongoing, the resolution of these issues should not be delayed. The Commission should reject Respondents' invitation to defer these issues to a later, ill-suited proceeding.

F. The Barge is a Common Carrier Service.

Respondents do not raise a legal defense to the Village's argument that the Barge's services render it a common carrier. Instead, their only defense is to raise a factual dispute, arguing that the Barge does not "take possession of any household goods" and, in fact, does

not even know the "types of materials and equipment transported by vehicles utilizing the barge service." Response at 24-25.

"[W]hether the carrier is acting as a common carrier or as a contract carrier is a question of fact. The fact is to be determined, in proceedings of this kind, by the Commission." *State ex rel. Utils. Comm'n v. Gulf-Atl. Towing Corp*., 251 N.C. 105, 109, 110 S.E.2d 886, 889 (1959) (proceeding to determine whether barge company was common carrier subject to intrastate regulation). A factual dispute cannot be resolved on a motion to dismiss, and Respondents' argument should be rejected on this ground. *See Charlotte Motor Speedway, LLC*, 230 N.C. App. at 5, 748 S.E.2d at 175.

Moreover, Respondents' claim that the Barge does not know that it carries household goods is contradicted by their public statements. In a document titled "How to Pack for Your Bald Head Island Trip," bearing the BHIT logo, BHIT advertises Limited as the sole means for transporting furniture (indisputably a household good) to the Island:[21]

[image appears on following page]

[21] *See How to Pack for Your Bald Head Island Trip*, Bald Head Island Transportation, Inc., https://cms.scurtomarketing.com/_data/1033/uploads/how-to-pack-for-bhi.pdf (last visited Apr. 11, 2022); *see also* Cmplt. ¶ 65 ("The Barge . . . is held open to the public to transport household goods and persons (among other things) to and from the Island for compensation.").

BALD HEAD ISLAND TRANSPORTATION, INC.

How to Pack for Your Bald Head Island Trip

Bald Head Island Transportation, Inc. ferries carry hundreds of thousands of passengers to and from the island annually, many of them with baggage. Baggage may be loaded onto a conveyor belt and onto ferry dollies for processing.

* * *

Items not allowed on ferries:

- Furniture must be transported via Bald Head Island Limited's barge and special arrangements must be made. Barge reservations may be made by calling (910) 457-5205.

Respondents concede that Barge users must pay for use of the Barge. Response at 24 (noting that transportation on Barge costs "$60 per six-foot length"). Thus, Limited "holds itself out to the general public to engage in transportation of . . . household goods for compensation" such that the Barge is a common carrier under N.C. Gen. Stat § 62-3(6).

But even if a factual dispute were ripe for consideration on a motion to dismiss—which it is not—and even if Limited were unaware of the items it carries on its Barge—which is not true—Respondents' argument *still* would not have merit. Without citation, Respondents read a scienter requirement into the definition of common carrier, arguing that a "common carrier" can only be liable as such if it *knowingly* transports household goods. Response at 25. There is no basis in the law for Respondents' interpretation, and Respondents cite none. Rather, the "crucial test to determine whether one is a common carrier is whether he holds himself out as such. . . . . either expressly or by a course of conduct." *State ex rel. Utils. Comm'n v. Bird Oil Co.*, 302 N.C. 14, 26, 273 S.E.2d 232, 239 (1981) (internal quotation marks omitted). Limited expressly, and by its course of conduct, holds itself out as the exclusive means for transporting large household goods to the Island. *See also* Cmplt. ¶¶ 26–27, 33, 65.

Likewise, Respondents' argument that the Barge does not "take possession" of household goods is not a basis for dismissal. *See* Response at 24. Again, their attempt to raise a factual dispute is inappropriate at the motion-to-dismiss stage. But even so, Respondents do not, and cannot, cite any requirement that a common carrier "take possession" of household goods. Further, they cite no authority for their assertion that the Barge's current conduct does not constitute "taking possession."

Finally, Respondents note that "the definition of 'public utility' includes a person '[t]ransporting persons or household goods by street' or 'by motor vehicles.'" Response at 25 (citing N.C. Gen. Stat. § 62-23(a)(3)-(4)). They omit, however, that the definition of "public utility" also includes transportation of persons or household goods by "any other form of transportation for the public for compensation." N.C. Gen. Stat. § 62-23(a)(4). Respondents offer no basis for ignoring Section 62-23(a)(4), other than their own "information and belief" that the Commission does not typically regulate barges. Response at 25. Such speculation falls far short of constituting legal authority.

Respondents cannot support a motion to dismiss by raising factual challenges. And even if they could, they cannot escape the Commission's regulation through feigned ignorance of the fact that they regularly transport household goods on the Barge. Respondents operate a common carrier and should be regulated accordingly.

CONCLUSION

The Commission's *Order Serving Answer and Motion to Dismiss* requests that the Village advise the Commission whether BHIT's and Limited's response is acceptable and, if not, whether Complainant requests a hearing to present evidence or to provide oral argument. Therefore, the Village respectfully advises the Commission that the response is

not acceptable and requests that the Commission issue a procedural order setting a schedule for discovery, allowing the parties to file any other dispositive motions and memoranda of law in support thereof, and setting a hearing for the purpose of receiving evidence and resolving any factual disputes.

Respectfully submitted, this 22nd day of April, 2022.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complainant's Reply to Respondents' Response, Motion to Dismiss, and Answer has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This the 22nd day of April, 2022.

By: /s/ Marcus Trathen